defendants/respondents allege that the plaintiff/appellant to claim as in paragraph 6(a)-(e) of the Statement of Claim the full purchase price is not only unreasonable as the machines were second-hand and subject to usual depreciations but also caught by section 75 of the Contracts Act, 1950. If this is disputed then the defendants/respondents' counsel urged the Court to find that it is then a triable issue which can only be thrashed out again in a proper trial which requires both parties to produced evidence of value of the subject vehicles followed by proper submissions on the law. The Court is in agreement with this view.

Then lastly the defendant/respondent submitted that the fact that a Senior Counsel had been engaged to appear in this matter was clear indication that this case involves complex issues of fact and law. The Court is in agreement with this submission for in going through the affidavits of plaintiff/appellant sworn on January 14, 1985 the Court takes notice particularly paragraph 5 of the said affidavit that there are too many "ifs" and the "ifs" relate to triable issues.

I hold that the two cases cited by the plaintiff/appellant, *viz., United Engineers (Malaysia) Ltd.* v. *Lai Ping Yoon*[2] cannot be applied in our present case as the decision was arrived at after a full trial and can be distinguished in that the claim therein related solely to arrears of rental and did not include, as in our present case, damages for breach of hire purchase agreement (see page 192-F of this case), and there being no dispute as to the date of termination of the agreement the claim for arrears, being met by Defence of machines not being in order, was only up to the date of termination. So also is the case of *Khoo Thau Sui* v. *United Engineers (M) Sdn. Bhd.*[3] The Court's decision to make the appellant liable was arrived at after a full trial. The appeal was against the decision after that full trial. As such these cases are distinguishable from decisions from cases of application in Chambers for final judgment under O.18, r. 19, High Court Rules 1980, such as *Voo Min En* v. *Liong Cheng Fatt,*[4] citing *Cow* v. *Casey*[5] which decided that at that stage claimant can only be entitled if and where the Court is satisfied it is really unarguable. The Court was also bound by decisions such as *United Malayan Banking Corporation* v. *Palm & Vegetable Oils (M) Sdn. Bhd. & 2 Ors.*[6] and also similar cases such as *Syarikat Bunga Raya Timor Jauh Sdn. Bhd.* v. *Tractors Malaysia Bhd.*[7] a decision on leasing hire purchase agreement, that where there are triable issues then the only place for it is a proper trial and leave should be given to the defendant to defend.

That being the case the Court came to the conclusion that in order to come to a just and proper decision, this matter must go to a full trial for reasons stated above. I therefore dismissed the plaintiff/appellant's application with costs. In dismissing the plaintiff/appellant's application the Court is far from saying that the appellant will not be entitled to his claim but what we are saying is that the proper place for airing the issues is elsewhere. The plaintiff/appellant may well be successful in his claim at the conclusion of that trial.

The plaintiff/appellant appeals.

Application dismissed.

Solicitors: *Chau & Thien Co.; Richard Malanjum & Co.*

PAVONE v. PUBLIC PROSECUTOR

[O.Cr.J. (Edgar Joseph Jr. J.) May 22, 1985]

[Penang – Criminal Application No. 1 of 1985]

Criminal Law and Procedure – Impeaching credit of witness – Certified copy of record – Procedure to be followed – Evidence Act, 1950, ss. 76, 79(1), 80, 91, 92 & 121 – Criminal Procedure Code (F.M.S. Cap. 6), s. 267.

In this case at the retrial of the accused, a police officer denied that he had said at the earlier trial that his test of the exhibit recovered from the person of the accused was 'opium'. He maintained that it was an opiate and that he had said the same thing at the trial. Counsel for the accused then informed the Court that he intended calling the President who presided at the original trial for the purpose of impeaching the credit of the witness. The request was refused and counsel then applied to the High Court for the necessary order.

Held: (1) a certified true copy of the record of the original trial could be admitted under section 76 of the Evidence Act and such record should remain uncontradicted;

(2) the Court will have to decide whether the difference between the evidence recorded earlier and the evidence given at the retrial is material. If so leave to cross-examine should be given and the procedure for impeachment of the witness followed;

(3) it is clear that the only explanation given by the officer in this case is a denial that he used the word 'opium'

at the original trial. So all that needs to be done is to put in the record at the original trial by calling the proper officer of court who has custody of the same, presumably the Registrar of the Court.

Cases referred to:

(1) *Ah Mee* v. *Public Prosecutor* [1967] 1 M.L.J. 220.
(2) *Public Prosecutor* v. *Modali Kutti* (1915) 3 F.M. S.L.R. 1.
(3) *Brij Bhushan Singh* v. *R.* A.I.R. 1946 P.C. 38.
(4) *Mamand* v. *Emperor* A.I.R. 1946 P.C. 45.
(5) *Muthusamy* v. *Public Prosecutor* [1948] M.L.J. 57.

CRIMINAL APPLICATION.

Karpal Singh for the applicant.
Bazain bin Idris (Deputy Public Prosecutor) for the respondent.

Edgar Joseph Jr. J.: This application for a Special Order under section 121 of the Evidence Act, 1950 ("the Act") by the prisoner Pavone ("the Accused") charged with an offence of trafficking in a dangerous drug, to wit, 402 grammes of hereon arose out of certain events which occurred at his partly heard retrial in the Sessions Court which I had ordered for reasons which appear in my judgment reported in [1984] 1 M.L.J. 77.

These events may be stated thus: under cross-examination by counsel for the defence, the Investigation Officer, who was one ASP Fariddudin bin Dato Ahmad (P.W.5), denied that he had said, at the original trial, that his test of the offending exhibit recovered from the person of the accused revealed that it was opium. Indeed, he denied that he had even used the word "opium" on that occasion. He maintained that he had then said the same thing as he was saying now, namely, that "it was an opiate".

As a result, counsel informed the court that he intended calling the learned President who presided at the original trial for the purpose of impeaching the credit of this witness.

Upon being queried as to whether there was any provision authorising such an application counsel replied "I shall try to make arrangements to have records available tomorrow."

Counsel was then queried as to whether it was going to be material even if the witness did say at the original trial that the substance concerned was opium. Counsel maintained that it would be.

The court then refused the application to impeach the credit of the witness.

For a better understanding of the issues which arise upon this Application, I consider it necessary to quote from the record of proceedings, full particulars of this ruling by the court. It reads:

"I do not agree with counsel that this is material or relevant. Even if he did say it was opium he was in no position to say so with authority. His evidence is not to be relied on as to what the substance actually is or was. I would therefore disallow the application to impeach witness's credit on this ground."

The hearing proceeded and, in due course, the prosecution closed its case. The case was then adjourned to a date one week later when the counsel announced that he was making no submission. The defence was then called and counsel renewed his request to call the learned President who presided at the original trial to produce the transcript of the Notes of Proceedings of the witness ASP Fariddudin and especially of the observation made by the court during the final addresses which reads:

"I have it down as 'opium' in the court's records and we will have to go by that. It was repeated several times in testimony."

This request the court granted and adjourned remark:

"I am of the view that this is barred by the provisions of section 121 of the Evidence Act. The proper officer to call for the production of the records should be the Registrar. In any case, since the purpose of the records is merely to show that P.W.5 said it was 'opium' in the earlier proceeding and in view of my ruling on counsel's application earlier I still hold the statement to be irrelevant and refuse counsel's application."

Counsel then responded by saying that he would be applying to the High Court for the necessary order and requested that in the meanwhile the hearing be adjourned.

This request the court granted and adjourned the hearing, at first, to May 20, 1985, and thereafter, to a date three days later.

When the application came before me I drew counsel's attention to the provisions of section 76 of the Act, which provide for the admission of certified true copies of public documents which, of course, include notes of proceedings recorded in judicial proceedings.

I then told counsel if this section is properly invoked and the certified copy of the proceedings at the original trial produced by calling the proper officer having custody of the records to produce the same then the presumptions under sections 79(1) and 80 of the Act would arise.

Section 79(1) reads as follows:

"The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in Malaysia who is duly authorized thereto:

Provided that the document is substantially in the form and purports to be executed in the manner directed by law in that behalf."

Section 80 reads as follows:

"Whenever any document is produced before any court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law and purporting to be signed by any Judge, President of a Sessions Court or Magistrate or by any such officer as aforesaid, the court shall presume that –

(a) the document is genuine;

(b) any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true; and

(c) such evidence, statement or confession was duly taken."

I added that there are equally explicit provisions which state that the evidence of each witness shall be taken down in legible handwriting by the presiding officer of a Subordinate Court and shall form part of the record (see section 267 of Criminal Procedure Code). This in turn would bring into play section 91 of the Act which applied as much to criminal as to civil proceedings. So far as material to this case, it provides, "In all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of the terms . . . of such matter except the document itself." Similarly, section 92 of the Act would operate to exclude all parol evidence seeking to contradict or vary what was set out in writing.

The effect of the above provisions would be the same as in the Federal Court case of *Ah Mee* v. *Public Prosecutor*,[1] namely, that a certified true copy of the record of the original trial, which would include the observation of the court regarding the testimony of ASP Fariddudin, should remain uncontradicted. This, I pointed out to counsel, was entirely in accord with the old case *Public Prosecutor* v. *Modali Kutti*,[2] which is authority for the proposition that in a prosecution for perjury during a criminal trial the record is the only evidence admissible to prove the words used because section 226 of the Criminal Procedure Code, 1902 (see section 267 of Cap. 6) imposes a duty on the judge to take down the evidence in writing.

It goes without saying that there will also have to be proof of identity, that is to say, evidence *de hors* the certified copy of the record, showing that ASP Fariddudin is the selfsame person who gave evidence at the original trial.

The next point to note is this: it is clear from the notes of proceedings of the retrial that the learned President has taken the view that whether or not ASP Fariddudin had said at the original trial that his test revealed that the offending exhibit recovered from the person of accused was opium was irrelevant since "he was in no position to say so with authority."

With respect, the competence of ASP Fariddudin to speak as to the nature of the offending exhibit although obviously relevant to the question whether his evidence or that of the chemist should be preferred by the court, has no relevance whatsoever to the application for impeachment. It must be recognised that the record of proceedings at the original trial can only be used for the purpose of cross-examining ASP Fariddudin under the provisions of sections 145(1) and 155(c) of the Act. It can on no count constitute substantative evidence at the retrial. By analogy, I would refer to the Privy Council cases of *Brij Bhushan Singh* v. *R.*[3] and *Mamand* v. *Emperor*,[4] which are authorities for the proposition that a statement made under section 164 of the Indian Criminal Procedure Code (equivalent to the old section 113 of our Code) used for purposes for impeaching the credit of a witness cannot be used as substantative evidence. Such a statement can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false but that does not establish that what he stated out of court under the section is true.

It follows, therefore, that the proper approach for the learned President to adopt is this: once the certified copy of the record of proceedings in the original trial is produced and his attention drawn

to the alleged difference between what ASP Fariddudin had testified previously and now he will have to decide if it is material. For this purpose, the chemist could be recalled to ascertain whether there is a material difference between the words 'opium' and 'an opiate'. It should be noted that the provisions as to the presumptions and penalties under the Dangerous Drugs Act, 1952, for opium and heroin can be very different, depending on the quantity of drugs involved.

If the difference is found to be material, then leave to cross-examine should be given and the procedure laid down by Taylor J. in the oft quoted case of *Muthusamy* v. *Public Prosecutor*[5] followed.

It is clear from the record provided that the only explanation offered by ASP Fariddudin is a denial that he used the word 'opium' at the original trial. So all that needs to be done is to put in the record at the original trial by calling the proper officer of the Court who has custody of the same, presumably, the Registrar, Sessions Court.

After I had explained to counsel what I thought was the legal position, as outlined above, he asked that no order be made on his application and I acceded to his request.

I have a final point to make. Section 121 of the Act is based on general grounds of convenience and public policy. Obviously, it would cause great inconvenience and perhaps, embarrassment, if Magistrates or Presidents are withdrawn from their own Courts to answer questions as to their own conduct at trials at which they have presided. It follows that it is only in altogether exceptional circumstances that a Special Order will be made under the section and that too only when it appears essential to the just decision of a case.

Ruled accordingly.

Solicitors : *Karpal Singh & Co.*

UNITED MALAYAN BANKING CORPORATION BHD. v. OFFICIAL RECEIVER AND LIQUIDATOR OF SOON HUP SENG SDN. BHD. (IN LIQUIDATION) & ANOR.

[O.C.J. (Shankar J.) May 28, 1985]

[Johore Bahru – Originating Summons No. 378 of 1983]

Company Law - Floating charge on movable and immovable property – Charge crystallises when receiver is appointed – Winding up of company – Secured debenture holder has priority over unsecured creditors – Commencement of winding up – Attachment in execution in force against company becomes void – Prohibitory Order – Companies Act, 1965, ss. 108, 223, 224 & 292.

Power of Attorney – Power given to debenture holder to appoint receiver to act in the name of the company – Registration required – Powers of Attorney Ordinance, 1949, s. 4.

In this case Soon Hup Seng Sdn. Bhd. (Company in liquidation) borrowed $154,000 and $35,000 from United Malayan Banking Corporation Bhd. on security of land by creating a first and second charge on that land. Later the company executed a debenture to borrow another $100,000 from the bank by way of floating charge on all its movable and immovable properties with power to appoint a receiver under certain contingencies. The charges were duly registered under the Companies Act and the National Land Code. Meanwhile a creditor of the company M/s Sin Min Auto (Pte.) Ltd. obtained a decree against the company for $41,328.77 with costs. The judgment creditor took proceedings by way of attachment in execution and obtained a prohibitory order against the said land in April 1982. The said prohibitory order was extended from time to time. On January 8, 1983, the bank appointed a receiver of the company's properties. The receiver's attempts to sell the land were aborted because of the prohibitory order obtained by the creditor. On January 24, 1983, the creditor filed a winding up petition against the company which was ordered to be wound up on June 29, 1983.

The creditor also raised the following contentions:

(1) On winding up of the company the properties of the company vested in the Liquidator and the Receiver could not sell any property without the leave of the Court.

(2) If the Bank claimed on the basis of the floating charge it could claim only $100,000 and not as holder of first and second charge on land.

(3) Receiver cannot act in the name of the company as no power of attorney had been registered under the Powers of Attorney Ordinance, 1949.

The Bank applied to the court for directions by way of an Originating Summons.

Held: (1) the bank should register the power of attorney under the Powers of Attorney Ordinance, 1949;

(2) the bank could sell the land and recover moneys